

CHAPTER 20

THE ANTIDEFICIENCY ACT

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CHAPTER 20

THE ANTIDEFICIENCY ACT

I. INTRODUCTION.

II. REFERENCES.

- A. 31 U.S.C. § 1341 (prohibiting obligations or expenditures in excess of appropriations and contracting in advance of an appropriation).
- B. 31 U.S.C. § 1342 (prohibiting government employees from accepting voluntary services).
- C. 31 U.S.C. §§ 1511-1517 (requiring apportionment/administrative subdivision of funds and prohibiting obligations or expenditures in excess of apportionment or administrative subdivision of funds).
- D. 31 U.S.C. § 1344 (prohibiting the unofficial use of passenger carriers).
- E. OMB Cir. A-34, Instructions on Budget Execution (Dec. 1995).
- F. DOD Regulation 7000.14-R, Financial Management Regulation, vol. 14 (Aug. 1995) [hereinafter DOD 7000.14-R]. Go to <http://www.dtic.mil/comptroller/fmr>.
- G. Air Force Instr. (AFI) 65-608, Antideficiency Act Violations (May 1998).
- H. Interim Guidance on Procedures for Administrative Control of Appropriations and Funds Made Available to the Department of the Air Force (October 1999) [hereinafter Air Force Procedures for Administrative Control of Appropriations] available at <http://dfas4dod.dfas.mil/centers/dfasde/denvercenter/regulations.htm>.
- I. Defense Finance and Accounting Service--Indianapolis Reg. (DFAS-IN) 37-1, Finance and Accounting Policy Implementation. Go to <http://dfas4dod.dfas.mil/centers/dfasin/library/ar37-1>.
- J. Hopkins and Nutt, The Anti-Deficiency Act (Revised Statute 3679) and Funding Federal Contracts: An Analysis, 80 Mil. L. Rev. 51 (1978).

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III. FISCAL CONTROLS AT THE APPROPRIATION LEVEL. THE FIRST LEVEL --
31 U.S.C. § 1341.

- A. In Excess of. An officer or employee may not make or authorize an obligation or expenditure that exceeds an amount available in an appropriation or fund. 31 U.S.C. § 1341(a)(1)(A). Department of Labor-Interagency Agreement Between Employment and Training Admin. and Bureau of Int'l Labor Affairs, B-245541, 71 Comp. Gen. 402 (1992); To Glenn English, B-223857, Feb. 27, 1987 (unpub.).
1. The scope of this statute is broader than that of the apportionment statutes. It includes appropriations not subject to apportionment, e.g., expired appropriations. Matter of Adjustment of Expired and Closed Accounts, B-253623, Sept. 28, 1994 (unpub.); The Honorable Andy Ireland, House of Representatives, B-245856.7, 71 Comp. Gen. 502 (1992).
 2. The GAO has opined that this statute prohibits obligations in excess of appropriated or authorized amounts and obligations that violate specific statutory restrictions on obligations or spending. Reconsideration of B-214172, B-214172, 64 Comp. Gen. 282 (1985); Customs Serv. Payment of Overtime Pay in Excess of Limit in Appropriation Act, B-201260, 60 Comp. Gen. 440 (1981).
- B. In Advance of. An officer or employee may not involve the government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law. 31 U.S.C. § 1341(a)(1)(B); Propriety of Continuing Payments under Licensing Agreement, B-225039, 66 Comp. Gen. 556 (1987) (20-year agreement violated this provision because the agency had only a one-year appropriation); To the Secretary of the Air Force, B-144641, 42 Comp. Gen. 272 (1962).
- C. Sequestered Funds. An officer or employee may not make or authorize an expenditure or obligation, or involve the government in a contract for the payment of money required by law to be sequestered. 31 U.S.C. § 1341(a)(1)(c) and (d).
- D. Exceptions. A contracting officer may obligate in excess of, or contract in advance of, an appropriation if authorized by law.

1. The statute specifically must authorize entering into a contract in advance of or in excess of an appropriation. The Army Corps of Eng'rs' Continuing Contracts, B-187278, 56 Comp. Gen. 437 (1977); To the Secretary of the Air Force, B-144641, 42 Comp. Gen. 272 (1962).
 - a. Example: 41 U.S.C. § 11 permits the DOD and the Coast Guard to contract without an appropriation for clothing, subsistence, forage, fuel, quarters, transportation, or medical and hospital supplies for the current fiscal year (FY). Report use of this authority to the next higher level of command. See DOD 7000.14-R, vol. 3, ch. 12, para. 120207; DFAS-IN 37-1, ch. 8, para. 0818 (requiring local commanders to forward reports through command channels).
 - b. The authority conferred by 41 U.S.C. § 11 is “contract” authority, and does not authorize disbursements. See Air Force Procedures for Administrative Control of Appropriations, § 4, para. E.
 2. Certain statutes authorize the execution of multiyear contracts. See, e.g., 10 U.S.C. §§ 2306(g), 2306b, 2829; 41 U.S.C. § 254c. See also FAR 17.104; DFARS 217.170; DLA Multiyear Contract for Storage and Rotation of Sulfadiazine Silver Cream, B-224081, 67 Comp. Gen. 190 (1988) (DLA lacked authority to execute multiyear contract).
- E. Contracts Conditioned Upon the Availability of Funds. See FAR 32.703-2; To the Secretary of the Interior, B-140850, 39 Comp. Gen. 340 (1959); To the Postmaster Gen., B-20670, 21 Comp. Gen. 864 (1942).
1. Activities may initiate certain contracting actions prior to an appropriation if the solicitation and contract include the clause, FAR 52.232-18, Availability of Funds. See To Charles R. Hartgraves, B-235086, Apr. 24, 1991 (unpub.) (award without clause violated the ADA).
 2. The government may not accept supplies or services under these contracts until the contracting officer has given notice that funds are available.

- F. Variable Quantity Contracts. Requirements or indefinite quantity contracts for services funded by annual appropriations may extend into the next fiscal year if the agency will order specified minimum quantities in the initial fiscal year. The contract also must incorporate FAR 52.232-19, Availability of Funds for the Next Fiscal Year. See FAR 32.703-2(b).

IV. APPORTIONMENT. THE SECOND LEVEL -- 31 U.S.C. §§ 1512 - 1513; 1517(A)(1).

- A. Requirement. 31 U.S.C. § 1512 requires apportionment of appropriations. 31 U.S.C. § 1513(b) requires the President to apportion Executive Branch appropriations. The President has delegated this authority to the Office of Management and Budget (OMB).
- B. Definition. An apportionment is a distribution by the OMB of amounts available in an appropriation into amounts available for specified time periods, activities, projects, or objects. OMB Cir. A-34, para. 21.1.1.
- C. Purpose of Apportionment. The OMB apportions funds to prevent obligation at a rate that would create a need for a deficiency or supplemental appropriation. As a general rule, an agency may not request an apportionment that will create a need for a deficiency or supplemental appropriation. 31 U.S.C. § 1512.
 - 1. Apportionment at a rate that would create a need for a deficiency or supplemental appropriation is permitted by 31 U.S.C. § 1515 for:
 - a. Military and civilian pay increases;
 - b. Laws enacted after budget submission which require additional expenditures; or
 - c. Emergencies involving life or property.
 - 2. An agency violates the apportionment statute if it must curtail its activity drastically to enable it to complete the fiscal year without exhausting its appropriation. To John D. Dingell, B-218800, 64 Comp. Gen. 728 (1985); To the Postmaster Gen., B-131361, 36 Comp. Gen. 699 (1957).

D. Prohibitions.

1. An officer or employee of the United States may not make or authorize an obligation or expenditure that exceeds an apportionment. 31 U.S.C. § 1517 (a)(1).
2. The statute does not prohibit obligating **in advance of** an apportionment. See Cessna Aircraft Co. v. Dalton, 126 F.3d 1442 (Fed. Cir. 1997); but see Air Force Procedures for Administrative Control of Appropriations, § 2, para. B.1 (providing that activities may not incur obligations until appropriations are apportioned).

V. **ADMINISTRATIVE DIVISION OF APPORTIONMENTS. THE THIRD LEVEL.**
31 U.S.C. § 1514.

- A. Administrative Fiscal Controls. 31 U.S.C. § 1514 requires agency heads to establish administrative controls that: (1) restrict obligations or expenditures to the amount of apportionments; and (2) enable the agency to fix responsibility for exceeding an apportionment. These regulations include:
1. OMB Cir. A-34, Instructions on Budget Execution, para. 31.5. This circular applies to all agencies and requires OMB approval of fund control systems.
 2. DOD Dir. 7200.1, Administrative Control of Appropriations; DOD 7000.14-R, vol. 14, app. A.
 3. DFAS-IN 37-1, Finance and Accounting Policy Implementation; Air Force Procedures for Administrative Control of Appropriations (superseding DFAS-DE 7200.1-R); NAVCOMPT 7300.101; MCOs P4200.15 and P7300.8.
- B. Administrative Subdivisions of Funds. OMB Cir. A-34, para. 21.1; DOD 7000.14-R, vol.14, app. A.

1. Allocations and Allotments. DFAS-IN 37-1, ch. 3, paras. 0312, 0314; Air Force Procedures for Administrative Control of Appropriations, § 5, para. B. These are formal subdivisions prescribed generally by 31 U.S.C. § 1514. The Army transmits these funds on a computer generated form (DA Form 1323) called a Fund Authorization Document or FAD. The Air Force uses AF Form 401, Budget Authority/Allotment; AF Form 402, Obligation Authority/Suballotment; and AF Form 1449, Operating Budget Authority (for O&M funds).
2. Allowance/Target/Advisory Guide. DFAS-IN 37-1, ch. 3, para. 031402; Air Force Procedures for Administrative Control of Appropriations, § 6 para. B. These distributions do not create formal administrative subdivisions. The Army also uses DA Form 1323 to distribute an allowance, but the form is called a Fund Allowance System (FAS) document for this type of distribution.
3. An officer or employee may not make or authorize an obligation or expenditure that exceeds a formal subdivision established by regulations. See 31 U.S.C. §1517(a)(2).

Discussion Problem: On 30 August, Fort Tiefert had \$170,000 remaining in its O&M allowance. On 2 September, the contracting officer awarded a contract for \$170,000 using these funds, but the Defense Accounting Office recorded this obligation as \$120,000. As a result, the Directorate of Resource Management believed erroneously that the Fort still had \$50,000 left in the O&M allowance. In order to avoid losing this money, the contracting officer awarded a contract on 20 September obligating \$50,000 in O&M. Is there an ADA violation?

VI. ANTIDEFICIENCY ISSUES.

- A. Purpose Statute. 31 U.S.C. § 1301(a). A violation of the Purpose Statute also may lead to a violation of 31 U.S.C. § 1341 or 31 U.S.C. § 1517. Department of Labor-Interagency Agreement Between Employment and Training Admin. and Bureau of Int'l Labor Affairs, B-245541, 71 Comp. Gen. 402 (1992); Funding for Army Repair Projects, B-272191, 97-2 CPD ¶ 141; To the Hon. Bill Alexander, B-213137, 63 Comp. Gen. 422 (1984). Officials **may** be able to avoid an antideficiency violation if:

1. Proper funds were available at the time of the erroneous obligation;
2. Proper funds were available continuously from the time of the erroneous obligation; and
3. Proper funds were available for the agency to correct the erroneous obligation.

See Air Force Procedures for Administrative Control of Appropriations, § 10, para. F.4. (providing that a reportable ADA violation may be avoidable if proper funds were available at the time of the original, valid obligation)

Discussion Problem: The Adjutant General (AG) of the State of Minnesota asked his best fishing buddy, the CG at Ft. Tiefert, for some help. The AG was planning a big bash to celebrate the 100th anniversary of the Minnesota National Guard. As part of this effort, the AG needed his public affairs office (PAO) personnel to perform a lot of work publicizing the occasion. Unfortunately, he did not have enough funds left in his budget to fund the extra drill periods required. After pondering the problem, the CG hit upon the ultimate solution. He arranged to have the National Guard PAO personnel brought on active duty for two weeks at Ft. Tiefert. When they reported for duty, the CG sent them to the AG's office to work on the birthday party. These personnel spent the entire two-week active duty period working on this project. Any ADA problems here?

B. "Bona Fide Needs Rule."

1. A violation of the Bona Fide Needs Rule, i.e., 31 U.S.C. § 1502, also may result in a violation of 31 U.S.C. § 1341 or 31 U.S.C. § 1517. See DFAS-IN 37-1, ch. 8, para. 0803; Air Force Procedures for Administrative Control of Appropriations, § 10, para. G.
2. To determine whether a Bona Fide Needs Rule violation is correctable, follow the same analytical process used for correcting a purpose violation.

C. Operation and Maintenance (O&M) Funds.

1. There is a limitation of \$500,000 on the use of O&M funds for construction. This is a “per project” limit. See 10 U.S.C. § 2805(c). Exceeding this threshold may be a reportable ADA violation. See DOD 7000.14-R, vol. 14, ch. 10; cf. Air Force Procedures for Administrative Control of Appropriations, § 6, para. C.6 (“Noncompliance with a statutory restriction on the use of an appropriation is a reportable violation.”). See also The Honorable Bill Alexander, B-213137, 63 Comp. Gen. 422 (1984) (holding that where purpose violations are correctable, ADA violations are avoidable).
2. DOD activities may use O&M funds for purchase of investment items costing less than \$100,000. See Defense Appropriations Act, 2000, Pub. L. No. 106-79, § 8046, 113 Stat. 1240 (1999). Use of O&M in excess of this threshold is a purpose violation and may trigger an antideficiency violation. See DOD 7000.14-R, vol. 14, ch. 10; Air Force Procedures for Administrative Control of Appropriations, § 6, para. C.2.

Discussion Problems:

--- On 3 August 1999, the Fort Tiefert contracting officer awarded a contract for 50 off-the-shelf computers for a total of \$110,000. The computers were to be used in a warehouse complex that would be completed (i.e., ready for installation of the computers) sometime in November 1999. Any fiscal issues here?

--- On 1 July 1999, the Fort Tiefert contracting officer awarded a \$435,000 contract for the construction of a storage facility. The contract was funded with FY 1999 O&M funds. Things went smoothly until 8 October 1999 when the contracting officer issued what she thought was an in-scope contract modification increasing the contract price by \$50,000. The contracting officer cited FY 1999 O&M funds on the modification. On 28 October, the Army Audit Agency (AAA) conducted a random audit of the Fort’s contracting process and determined that the 8 October modification was outside the scope of the original contract. Any fiscal issues here?

- D. Indemnification Provisions. Open-ended indemnification provisions violate 31 U.S.C. § 1341. See United States Park Police Indemnification Agreement, B-242146, Aug. 16, 1991 (unpub.); Project Stormfury, B-198206, 59 Comp. Gen. 369 (1980). To Howard Metzenbaum, B-174839.2, 63 Comp. Gen. 145 (1984); Assumption by Gov't of Contractor Liability to Third Persons, B-201072, 62 Comp. Gen. 361 (1983); Reimbursement of the State of New York Under Support Contract, B-202518, Jan. 8, 1982 (unpub.). There are statutory exceptions to this rule. See, e.g., 10 U.S.C. § 2354 (research/development contracts may contain indemnity provisions for unusually hazardous risks); 50 U.S.C. § 1431 (President may exempt certain defense-related agreements from Antideficiency Act); 42 U.S.C. § 2210(j) (NRC and DOE may initiate indemnification agreements).
- E. Judgments. A court or board of contract appeals may order a judgment in excess of an amount available in an appropriation or a subdivision of funds. This is not a violation. Bureau of Land Management, Reimbursement of Contract Disputes Act Payments, B-211229, 63 Comp. Gen. 308 (1984); Availability of Funds for Payment of Intervenor Attorney Fees, B-208637, 62 Comp. Gen. 692 (1983).
- F. Option Penalties. Contracts that include separate charges for failure to exercise options violate the Antideficiency Act. Honeywell Info. Sys., Inc., B-186940, 56 Comp. Gen. 167 (1976); Burroughs Corp., B-186313, 56 Comp. Gen. 142 (1976).
- G. Augmentation. An ADA violation may arise if an agency retains and spends funds received from outside sources, absent statutory authority. Unauthorized Use of Interest Earned on Appropriated Funds, B-283834, Feb. 24, 2000 (unpub.).
- H. Unauthorized Commitments. Would an unauthorized commitment trigger an antideficiency violation? See DFAS-IN 37-1, ch. 9, para. 090211; Air Force Procedures for Administrative Control of Appropriations, § 10, para. E.

Discussion Problem: SGT Jones, who has no authority to make purchases on behalf of the government, goes to the local parts store and charges a new diesel engine to the government. Is this a problem?

VII. LIMITATION ON VOLUNTARY SERVICES. 31 U.S.C. § 1342.

- A. Voluntary Services. An officer or employee may not accept voluntary services or employ personal services exceeding those authorized by law, except for emergencies involving the safety of human life or the protection of property. To Glenn English, B-223857, Feb. 27, 1987 (unpub.).
1. Voluntary services are those services rendered without a prior contract for compensation, or without an advance agreement that the services will be gratuitous. Army's Authority to Accept Servs. from the Am. Assoc. of Retired Persons/Nat'l Retired Teachers Assoc., B-204326, July 26, 1982 (unpub.).
 2. Acceptance of voluntary services does not create a legal obligation. Richard C. Hagan v. United States, 229 Ct. Cl. 423, 671 F.2d 1302 (1982); T. Head & Co., B-238112, July 30, 1990 (unpub.); Nathaniel C. Elie, B-218705, 65 Comp. Gen. 21 (1985). Cf. T. Head & Co. v. Dep't of Educ., GSBGA No. 10828-ED, 93-1 BCA ¶ 25,241.
- B. Examples of Voluntary Services Authorized by Law.
1. 5 U.S.C. § 593 (agency may accept voluntary services in support of alternative dispute resolution).
 2. 5 U.S.C. § 3111 (student intern programs).
 3. 10 U.S.C. § 1588 (military departments may accept voluntary services for medical care, museums, natural resources programs, or family support activities).
 4. 10 U.S.C. § 2602 (President may accept assistance from Red Cross).
 5. 10 U.S.C. § 10212 (SECDEF or Secretary of military department may accept services of reserve officers as consultants or in furtherance of enrollment, organization, or training of reserve components).

6. 33 U.S.C. § 569c (Corps of Engineers may accept voluntary services on civil works projects).
- C. Application of the Emergency Exception. This exception is limited to situations where immediate danger exists. Voluntary Servs. -- Towing of Disabled Navy Airplane, A-341142, 10 Comp. Gen. 248 (1930) (exception not applied); Voluntary Servs. in Emergencies, 2 Comp. Gen. 799 (1923). This exception does not include “ongoing, regular functions of government the suspension of which would not imminently threaten the safety of human life or the protection of property.” 31 U.S.C. § 1342.
- D. Gratuitous Services Distinguished.
1. It is not a violation of the Antideficiency Act to accept free services from a person who agrees, in writing, to waive entitlement to compensation. Army’s Authority to Accept Servs. From the Am. Assoc. of Retired Persons/Nat’l Retired Teachers Assoc., B-204326, July 26, 1982 (unpub.); To the Adm’r of Veterans’ Affairs, B-44829, 24 Comp. Gen. 314 (1944); To the Chairman of the Fed. Trade Comm’n, A-23262, 7 Comp. Gen. 810 (1928).
 2. An employee may not waive compensation if a statute establishes entitlement, unless another statute permits waiver. To Tom Tauke, B-206396, Nov. 15, 1988 (unpub.); The Agency for Int’l Dev. -- Waiver of Compensation Fixed by or Pursuant to Statute, B-190466, 57 Comp. Gen. 423 (1978) (AID employees could not waive salaries); In the Matter of Waiver of Compensation, Gen. Servs. Admin., B-181229, 54 Comp. Gen. 393 (1974); To the Director, Bureau of the Budget, B-69907, 27 Comp. Gen. 194 (1947) (expert or consultant salary waivable); To the President, United States Civil Serv. Comm’n, B-66664, 26 Comp. Gen. 956 (1947).

3. Acceptance of gratuitous services may be an improper augmentation of an appropriation if federal employees normally would perform the work, unless a statute authorizes gratuitous services. Compare Community Work Experience Program -- State Gen. Assistance Recipients at Fed. Work Sites, B-211079.2, Jan. 2, 1987 (unpub.) (augmentation would occur) with Senior Community Serv. Employment Program, B-222248, Mar. 13, 1987 (unpub.) (augmentation would not occur). Cf. Federal Communications Comm'n, B-210620, 63 Comp. Gen. 459 (1984) (noting that augmentation entails receipt of funds).

Discussion Problem: For the last year, Ft. Tiefert's MACOM (Major Command) has been pushing subordinate commands to implement the MACOM Voluntary Services Program (VSP). Authority for the VSP flows from 10 U.S.C. § 1588, which permits the Secretary of the Army to accept voluntary services for programs that support members of the armed forces and their families (such as family support, child development and youth services, and employment assistance for spouses). The VSP has worked so well at Ft. Tiefert that the CG there decided to expand the program. Under Ft. Tiefert's Improved VSP (IVSP), volunteers have painted offices, straightened out the post HQ's filing system, and refurbished a dilapidated old building completely (to include putting on a new roof) using materials donated by local merchants. Any ADA issues?

VIII. VOLUNTARY CREDITOR RULE.

- A. Definition. A voluntary creditor is one who uses personal funds to pay what is perceived to be a government obligation.
- B. Reimbursement. Generally, an agency may not reimburse a voluntary creditor. Specific procedures and mechanisms exist to ensure that the government satisfies its valid obligations. Permitting a volunteer to intervene in this process interferes with the government's interest in ensuring its procedures are followed. Bank of Bethesda, B-215145, 64 Comp. Gen. 467 (1985).

C. Claims Recovery. U.S. International Trade Commission – Cultural Awareness, B-278805, July 21, 1999 (unpub.) (noting that agencies, not the GAO, now must render decisions on such claims); Lieutenant Colonel Tommy B. Tompkins, B-236330, Aug. 14, 1989 (unpub.); Claim of Bradley G. Baxter, B-232686, Dec. 7, 1988 (unpub.); Irving M. Miller, B-210986, May 21, 1984 (unpub.); Grover L. Miller, B-206236, 62 Comp. Gen. 419 (1983); Reimbursement of Personal Expenditures by Military Member for Authorized Purchases, B-195002, May 27, 1980, 80-2 CPD ¶ 242. See Reimbursement of Selective Serv. Employee for Payment of Fine, B-239511, 70 Comp. Gen. 153 (1990) (returning request for decision to agency so it could determine who was responsible for paying fine). Cf. Use of Imprest Fund to Reimburse Employee for Small Purchase, B-242412, July 22, 1991 (unpub.). See DFAS-IN 37-1, ch. 9, para. 092037. Claims are recoverable if:

1. The underlying expenditure is authorized;
2. The claimant shows a public necessity^[T.H.1];
3. The agency could have ratified the transaction if the voluntary creditor had not made the payment.

IX. PASSENGER CARRIER USE. 31 U.S.C. § 1344; 41 C.F.R. Subparts 101-6.4 and 101-38.3.

A. Prohibition. An agency may expend funds for the maintenance, operation, and repair of passenger carriers only to the extent that the use of passenger carriers is for official purposes. Federal Energy Regulatory Comm’n’s Use of Gov’t Motor Vehicles and Printing Plant Facilities for Partnership in Educ. Program, B-243862, 71 Comp. Gen. 469 (1992); Use of Gov’t Vehicles for Transp. Between Home and Work, B-210555, 62 Comp. Gen. 438 (1983). Violations of this statute are not antideficiency violations, but significant sanctions do exist. See Felton v. Equal Employment Opportunity Comm’n, 820 F.2d 391 (Fed. Cir. 1987); Campbell v. Department of Health and Human Servs., 40 M.S.P.R. 525 (1989); Gotshall v. Department of Air Force, 37 M.S.P.R. 27 (1988); Lynch v. Department of Justice, 32 M.S.P.R. 33 (1986).

B. Exceptions.

1. Generally, the statute prohibits domicile-to-duty transportation of appropriated and nonappropriated fund personnel.
 - a. The agency head may determine that domicile-to-duty transportation is necessary in light of a clear and present danger, emergency condition, or compelling operational necessity. 31 U.S.C. § 1344(b)(8).
 - b. The statute authorizes domicile-to-duty transportation if it is necessary for fieldwork, or is essential to safe and efficient performance of intelligence, law enforcement, or protective service duties. 31 U.S.C. § 1344(a)(2).
2. Overseas, military personnel, federal civilian employees, and family members may use government transportation when public transportation is unsafe or unavailable. 10 U.S.C. § 2637.
3. This statute does not apply to the use of government vehicles (leased or owned) when employees are in a temporary duty status. See Home-to-Airport Transp., B-210555.44, 70 Comp. Gen. 196 (1991) (use of government vehicle for transportation between home and common carrier authorized in conjunction with official travel); Home-to-Work Transp. for Ambassador Donald Rumsfeld, B-210555.5, Dec. 8, 1983 (unpub.).

C. Penalties.

1. Administrative Sanctions. Commanders shall suspend without pay for at least one month any officer or employee who willfully uses or authorizes the use of a government passenger carrier for unofficial purposes or otherwise violates 31 U.S.C. § 1344. Commanders also may remove violators from their jobs summarily. 31 U.S.C. § 1349(b).

2. Criminal Penalties. Title 31 does not prescribe criminal penalties for unauthorized passenger carrier use. But see UCMJ art. 121 [10 U.S.C. § 921] (misappropriation of government vehicle; maximum sentence is a dishonorable discharge, total forfeiture of pay and allowances, and 2 years confinement); 18 U.S.C. § 641 (conversion of public property; maximum punishment is 10 years confinement and a \$10,000 fine).

X. SANCTIONS FOR ANTIDEFICIENCY ACT VIOLATIONS.

- A. Adverse Personnel Actions. 31 U.S.C. §§ 1349(a), 1518; AFI 65-608, para. 4.11.
 1. Officers or employees who authorize or make prohibited obligations or expenditures are subject to administrative discipline, including suspension without pay and removal from office. DOD Dir. 7200.1; DOD 7000.14-R, vol. 14, ch. 9; Memorandum, Comptroller, Dep't of Defense, subject: Violations of the Antideficiency Act (19 Dec. 1994).
 2. Good faith or mistake of fact does not relieve an individual from responsibility for a violation. Factors such as “a heavy workload at year end” or an employee’s “past exemplary record” generally are relevant only to determine the appropriate level of discipline, not to determine whether the commander should impose discipline.
- B. Criminal Penalties. 31 U.S.C. §§ 1350, 1519. A knowing and willful violation of the Antideficiency Act is a Class E felony. See 18 U.S.C. § 3559(a)(5). Punishment may include a \$5,000 fine, confinement for two years, or both. Knowing and willful concealment of a violation is a felony. 18 U.S.C. § 4.

XI. REPORTING AND INVESTIGATING VIOLATIONS. 31 U.S.C. §§ 1351, 1517; OMB Cir. A-34, para. 32.1, DOD 7000.14-R, vol. 14, chs. 4-7; Memorandum, Principal Deputy Assistant Secretary of the Army (Financial Management and Comptroller), subject: Supplemental Guidance to AR 37-1 for Reporting and Processing Reports of Potential Violations of Antideficiency Act Violations [sic] (Aug. 17, 1995) [hereinafter Supplemental Guidance]; DFAS-IN 37-1, ch. 4, para. 040204; AFI 65-608, chs. 3,4.

- A. Flash Report. The commander of an Army activity at which a suspected violation occurs must send a flash report through command channels to DA within 15 days of discovery. DFAS-IN 37-1, ch. 4, para. 040204.B. For the Air Force, suspected violations must be reported within 10 working days to the cognizant MAJCOM, Field Operating Activity (FOA), or Direct Reporting Unit (DRU) Financial Management organization. See AFI 65-608, para. 3.3.
- B. Investigations.
 - 1. The first step is a preliminary review. The MACOM Commander (or commander at next higher level above the activity where the violation occurred) must appoint a team of experts consisting of an individual with resource management experience, an attorney, and an individual with expertise in the functional area in which the violation occurred. This team must conduct the preliminary review to determine whether an Antideficiency Act violation has occurred. For Army activities, the results of the preliminary review must reach DA not later than 90 days from the date of discovery of the potential violation. See Supplemental Guidance. For the Air Force, the review must be completed and reported to SAF/FMFP no later than 90 days from the review start date.
 - 2. If the preliminary review determines that a violation occurred, the appointing authority must appoint an investigative team to conduct a formal investigation. In the Army, formal investigations are conducted under the provisions of AR 15-6. See Supplemental Guidance; see also DOD 7000.14-R, vol. 14, chs. 4-6. Air Force investigators follow the guidance in AFI 90-301. A final report on the violation must reach the Office of the Under Secretary of Defense (Comptroller) within 9 months of the date of discovery of the violation. See DOD 7000.14-R, vol. 14, ch. 5.

3. If the investigating officer believes criminal issues may be involved, he should suspend the investigation immediately and consult with legal counsel to determine whether the matter should be referred to the appropriate criminal investigators for resolution. See DOD 7000.14-R, vol. 14, ch. 5.

C. Establishing Responsibility.

1. Responsibility for a violation is fixed at the moment the improper activity occurs, e.g., overobligation, overexpenditure, etc.
2. A responsible party is the person who has authorized or created the overdistribution, obligation, commitment, or expenditure in question. Reports may name commanders, budget officers, or finance officers because of their positions if they failed to exercise their responsibilities properly. "However, the investigation shall attempt to discover the specific act -- or failure to take an action -- that caused the violation and who was responsible for that act or failure to take an action." DOD 7000.14-R, vol. 14, ch. 5, para. I.
 - a. Generally, the responsible party will be the highest ranking official in the decision making process who had actual or constructive knowledge of precisely what actions were taken and the impropriety or questionable nature of such actions. Cf. To Dennis P. McAuliffe, B-222048, Feb. 10, 1987 (unpub.).
 - b. There often will be officials who had knowledge of either factor. The person in the best position to prevent the ultimate error, however, is the highest ranking official who was aware of both factors.

D. Reports to the President and Congress.

1. The Secretary of Defense must report violations to the President and Congress. OMB Cir. A-34, para. 32.2; DOD 7000.14-R, Vol. 14, Ch. 7, para. E.
2. Contents of the report.

- a. Administrative information;
- b. Nature of the violation;
- c. Identification of the responsible individual;
- d. Cause and circumstances of the violation;
- e. Administrative discipline imposed;
- f. Actions taken to correct the violation; and
- g. Statement of the responsible individual.

XII. CONTRACTOR RECOVERY WHEN THE ACT IS VIOLATED.

A. Recovery Under the Contract.

1. A contract may be null and void if the contractor knew, or should have known, of a specific spending prohibition. Hooe v. United States, 218 U.S. 322 (1910) (contract funded with specific appropriation). Cf. American Tel. and Tel. Co. v. United States, 177 F.3d 1368 (Fed. Cir. 1999).
2. Where contractors have not been responsible for exceeding a statutory funding limitation, the courts have declined to penalize them. See, e.g., Ross Constr. v. United States, 392 F.2d 984 (1968); Anthony P. Miller, Inc. v. United States, 348 F.2d 475 (1965).
3. The exercise of an option may be inoperative if the government violates a funding limitation. The contractor may be entitled to an equitable adjustment for performing under the “invalid” option. See Holly Corp., ASBCA No. 24975, 83-1 BCA ¶ 16,327.

B. Quasi-Contractual Recovery. Even if a contract is unenforceable or void, a contractor may be entitled to compensation under the equitable theories of quantum meruit (for services) or quantum valebant (for goods). 31 U.S.C. § 3702; Prestex Inc. v. United States, 320 F.2d 367 (Ct. Cl. 1963); Claim of Manchester Airport Auth. for Reimbursement of Oil Spill Clean-up Expenses, B-221604, Mar. 16, 1987, 87-1 CPD ¶ 287; Department of Labor--Request for Advance Decision, B-211213, 62 Comp. Gen. 337 (1983).

C. Referral of Claims to Congress. The GAO may refer non-payable claims to Congress. 31 U.S.C. § 3702(d); Campanella Constr. Co., B-194135, Nov. 19, 1979, 79-2 CPD ¶ 361.

Final Discussion Problem: For years, the Army owned an administrative office building adjacent to Fort Mojave. Several months ago, the MACOM Facilities Inspection Team directed the Commander of Fort Mojave to make several upgrades to the building. Fort Mojave's Engineer obtained funds for the project and forwarded a purchase request to the contracting officer. This document certified that \$70,000 O&M was available for the project. Two months later, the contracting officer awarded an \$82,000 contract to Constructors, Limited. To date, the contractor has received \$40,000 in progress payments. Yesterday, the Engineer learned that, in keeping with the installation closure plan, the Corps of Engineers had conveyed the building to the State one month before the award of the renovation contract. Any problems here?

XIII. CONCLUSION.

